IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, SICHALE & MOHAMMED, JJ.A.)

CIVIL APPEAL NO.61 OF 2007

BETWEEN

KENYA BROADCASTING CORPORATION……..…APPELLANT

AND

ANN MUTHONI KIBIRO……..…1ST RESPONDENT

DAVID KIBIRO GATHOGA…….2ND RESPONDENT

(An appeal from the Judgment/Decree of the High Court of Kenya at Nairobi (Njagi, J.), dated 26th October, 2004

in

H.C.C.C. No.1133 of 2002)

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JUDGMENT OF THE COURT

By the judgment delivered by the High Court on 26th October, 2004 (***Njagi, J.***), the appellant was directed to pay to the respondents two sums of money: Sh.3,670,531/20 for rent of eight months with effect from 1st April, 2002 at sh.458,816/40 per month plus interest at court rates and Sh.2,729,921/15 on account of water said to have been consumed by the appellant's staff when in occupation of the respondents' premises known as ***LR No.36/VII/487*** Eastleigh Nairobi. The latter sum, it was ordered, was for onward transmission to the then City Council of Nairobi, who supplied the water.

The decision followed a trial which was initiated by the respondents who filed a plaint dated 18th October, 2002. Therein it had been pleaded that the appellant and the respondents signed a lease agreement on 12th July, 2001 over the latter's said property into which the appellant put its staff to live. That although the lease stated that the tenants could pay for water and electricity consumed, the respondents had earlier opened water accounts for the respective residences. The appellant's staff consumed water through those accounts; the appellants who defaulted in payments, also neglected or failed to reimburse the respondents of the water bills paid at the time of termination of lease. Similarly, the appellant did not hand over the leased premises as per the notice served and acknowledged, but its staff remained in occupation, hence the claim for *mesne* profits. So, the respondents prayed the court to, *inter alia*, order the appellant to pay them *mesne* profits – Sh.6,423,429/60, and outstanding water bills –

sh.3,001,391/85.

To the said plaint, the appellant filed a defence dated 20th January, 2002 admitting that there was a lease agreement (1.4.01-31.3.02) but denied that there was an arrangement to reimburse the respondents for the paid water and electricity bills. It also denied rent arrears (or *mesne* profits) together with such other claims raised against it; it therefore, desired the court to dismiss the suit.

On 15th November, 2002, a reply to the defence was filed joining issues with the appellant and reiterating the claim as per the plaint.

After hearing both parties, the learned judge found that, since the lease agreement provided that the appellant would open its own water accounts:

"By failing to open its own water account and suffering its officers to continue consuming water the account of which was in the second plaintiff's name, I think that there was an implied undertaking on the part of the defendant that it would pay for that water. This much was acknowledged by DW1, *Mr. Ochako****, when he said under cross-examination that KBC (the defendant herein) knew that they were consuming water in the name of*** *David Kibiro****, the second plaintiff, and that if the bills were received and were in order, then KBC had an obligation to repay and settle the bills in the name of***

*David Gathoga****."***

Pursuant to the foregoing, the judge quantified the water bills at Sh.2.7m (see above) and ordered it paid to the local authority via the hands of the respondents.

And coming to the rent arrears or *mesne* profits, the learned judge said:

"In the circumstances, I would opine that it was the defendant who delayed the delivery of the premises in vacant possession to the plaintiffs."

And because the respondents did not take steps to recover the premises:

"By necessary implication (they) acquiesced in their continuing in possession, and that could imply consent for them to do so under s.116 of the Transfer of Property

Act…the property became one from month to month under s.106 of the same Act."

To that end, the judge found that the appellants were entitled to rents for 8 months with effect from 1st April, 2002 at sh.458.816/40 per month and the total sum referred to above was awarded to the respondents.

That decision provoked the current appeal premised on ten grounds as per the memorandum filed. It ranged mainly from faulting the learned judge for awarding rents for 8 months when the respondents had pleaded for *mesne* profits; finding against the appellant when no notice had been served under ***section 46 of the Kenya Broadcasting Corporation Act***; failing to find that with no privity of contract between the 2nd respondent and the appellant in respect of consumed water; not finding that the evidence of the 2nd respondent lacked credibility; not considering the different figures in water bills while some water meters were not functioning and that the case was decided against the weight of evidence. This appeal was heard by way of written submissions without highlighting.

The appellants opened by pointing out that the respondents filed a notice of appeal on 28th October, 2004 following the judgment herein but did not follow it up with filing a record of appeal. They did not withdraw that notice, which means that it is still in force, demonstrating that they conceded that the judgment was wrong. Neither did they file a notice to affirm the decision as per ***Rule 94 of the Court of Appeal Rules***.

Combining grounds 1, 2 and 10 on, rent the appellant submitted that it notified the 1st respondent that it did not intend to renew the lease but the 1st respondent insisted that a notice of 3 months according to the lease be complied with. Thus, she wanted to earn unjustified rents. She did not know even when the last tenant vacated the premises. Her rent claim was liquidated in terms of ***section 14 of the Distress for Rent Act.*** It was so pleaded meaning that with notice given not to renew, then with continued occupation double rent was repayable. Though the appellant gave evidence in support of that claim the learned judge instead found that section 14 was not applicable and he ordered that the award be based on a month-to-month basis instead of dismissing the claim. There had been no alternative relief sought on a month-to-month rental.

Turning to ground 3, we were told that ***section 46(a) of the Kenya Broadcasting Act*** applied and so the 2nd respondent was obliged to issue his own notice to the appellant before suing and not have it subsumed in that of the 1st respondent as the learned judge found.

Grounds 5, 6, 7 and 8 were argued together as regards the water bills. It was the appellant's contention that no water meters were ever installed during the period of the tenancy. There was thus no evidence and the trial judge fell in error to order the appellant to pay Sh.2.7m on account of consumed water. Thus the award ought not have been made. It was added that indeed the learned judge noted in his judgment that there were no meters at the commencement of the lease on 1st March, 1997. And also that there were no meters by the time the premises were vacated and certainly not before July, 2001. And most importantly, the water bills were unreliable and the judge noted so, doubting whether he could grant any sum allegedly incurred on account of such bills. As for the claim about paid electricity bills, though pleaded the court did not dismiss it, even as the respondents attempted to abandon it.

In reply, the respondents submitted that the trial court made an award for 8 months rent because he found that it took that long from the time the lease expired and when the appellant handed over vacant possession of the premises. The appellant had become a month-to-month tenant and the award was in line with the prayer that the court could give such other relief that seemed fit and just, and also in the inherent jurisdiction of the judge to do justice. In any case, the trial court found that the appellant delayed in the delivery of the property's vacant possession to the respondents and so was liable to pay rents for the period of 8 months.

As for the service of notice under ***section 46 of the Kenya Broadcasting Corporation Act***, the respondent maintained that one such notice was issued on 17th July, 2002 and that this was not one of the issues filed on 12th September, 2003 for determination in the High Court. Thus it cannot be raised on appeal. Further, that the appellant was not sued for acts related to its functions and mandate under ***section 8*** of the said Act.

We were told that the suit in the High Court was solely on the issue of the lease agreement between the 1st respondent and the appellant and that the latter failed to open its own water and electricity accounts. This had nothing with privity of contract. The appellant had instead consumed those utilities whose bills came in the name of the 2nd respondent. And it is ***Mr. Ochako*** admitted as much in cross-examination. So it was only fair that the appellant pays up. The trial judge found that to be the case. The sum of sh.2.7m ordered to be paid was based on verifiable evidence and not on the sum claimed. Had the appellant complied with the lease term to open its own accounts, this issue could not have arisen.

And lastly, that it was not necessary that any ground that was not proved or was abandoned be dismissed with costs or that it was necessary for the respondents to file a notice of affirmation under ***Rule 94 of the Court of***

Appeal Rules.

The appellant then filed a reply to the respondents' submissions in the main reiterating its own submissions but with two authorities appended which at this stage, the respondents could not be expected and did not react to.

This being the first appeal, we are enjoined to approach it as if it is a fresh trial whereby we review the recorded evidence and conclude by agreeing, or not agreeing with the trial judges' findings (see ***Selle vs Associated Motorboat Company Ltd and Others [1968] EA 123***.

In the High Court, the hearing proper got under way on 18th September, 2003 with the 1st respondent, ***Anne Muthoni Kibiro***, (PW1) telling the trial judge that the 2nd respondent, ***David Kibiro Gathoga,*** was her husband. On 24th March, 1997 she leased her property ***LR. 36/VII/-487***, Eastleigh Nairobi, the suit property to the appellant and an agreement was signed. The property had 37 residential flats and was leased for 2 years at a monthly rental of Sh.408,000/=. The agreement contained a term, *inter alia*, that the appellant would open and maintain water and electricity accounts in its name. The 2nd respondent undertook the management of the premises. After the initial term expired, there was a renewal followed by yearly terms. As per renewal No.5 produced, the appellant expressed a desire not to renew the tenancy after 31st March, 2002. The 1st respondent accepted that but the appellant did not invite her to take vacant possession with effect from 31st March, 2002. On that date the premises were not handed over and the respondents' lawyers were instructed to demand rent covering the period from the date of expiry of the lease. The handing over was done on 25th November, 2002, in the presence of agents of both side. PW1 produced Exh.P23 to the effect that monthly rent payable from January to March 2002 was Sh.458,816./40 p.m.

In cross-examination, the court heard that the water accounts which were in the name of the 2nd respondent with the City authority were not closed down. At this point, PW1 desired to abandon the claim regarding paid electricity bills and continued, that although the 2nd respondent did not sign the lease agreements, he was present and was involved. She did not know if the appellant knew that the water account was in the name of the 2nd respondent and she did not know when water was connected to the suit premises.

Robert Kagiri Mwihia (PW2), the director with Cammine Ltd, the agents who managed the suit property testified that he negotiated the initial lease agreement dated 24th March, 1997. The 2nd respondent was involved. The premises were handed over to the appellant before the lease was executed and water was yet to be connected. The appellant requested that water be connected to all the 37 flats:

"Account (was) opened in the name of *David Kabiro****. The responsibility for water payment was KBC's. We opened the account in*** *Kibiro's* ***name and KBC refunded the deposit paid."***

After installing water meters, the documents were handed to KBC and the flats were occupied. When bills were received, they were forwarded to the appellant by letter duly hand-delivered (Exh.14, 18). At some point the appellant replied that it was not its responsibility to pay the bills but it did not return them.

Then in February 2002 the appellant intimated by letter that it was not renewing the lease but the premises were not handed over until 25th November,

2002, after the repairs had been executed and the appellant telephoned to say that it was ready to hand over the premises. But on inspection, it was found that the water meters had been removed, PW2 was told, that they were taken to the appellants' offices. The issue of missing 37 meters was reflected in the handing over report. At the expiry of lease on 31st March, 2002, some rents remained unpaid and PW2 could not say when they paid.

PW2 in cross-examination told the trial court that water meters were installed before the appellant signed the lease but he could not recall exactly when they were installed. While the managing agent (PW2) received rents, water bills were delivered to the 2nd respondent who would then forward them to the appellant, by delivery book which was signed but not stamped (Exh.9, 10). At no time did the appellant deny responsibility to pay the bills. Bill (Exh.9) bore an amount of Sh.256,957/20. It was repeated that the water account was in the name of the 2nd respondent which the appellant was to facilitate. At some point the appellant complained of high water bills, a thing City Hall was receptive to. The lease was supposed

to expire on 31st March,

2002 and to PW2's knowledge, the appellant's staff/tenants did not move out.

In re-examination, reference was made to various letters and other documents contained in the respondent's bundle produced. At no time did the appellant inform PW2 that it had vacated the suit premises and even as at 10th May, 2002, when the letter of that date was written, the lease had since expired but water bills were still pending payment. To PW2, expiry of the lease did not absolve the appellant from paying the water bills. PW2 did not delay in receiving the vacant possession of the premises; when the appellant contacted him that the premises were ready, he arranged the handing-over meeting in November, 2002. And at no time did the appellant insist that it could not occupy the premises unless there were water meters. PW2 said that throughout the duration of the leases, responsibility to open water accounts was on the appellant, yet there was no evidence that it did that. Water bills were, however, sent to it.

The 2nd respondent (PW3) got in the witness box and told the trial court that he could not remember when the water meters were installed after he paid the deposit of Sh.22,300/=. And after the appellant took possession, City Hall started sending bills to PW3 which he got the managing agent to forward to the appellant. The water accounts were never converted into the name of the appellant. Its staff continued consuming water in the name of the 2nd respondent. He produced the schedule of bills up to August, 2002 with a sum of Sh.3,001,391/85, which the learned judge admitted. The witness also produced another set of 37 water bills as at 23rd March, 2003 – a computer printout – for Sh.3,071,443/=. These water accounts could not be closed until the outstanding bills were paid. The appellant gave a notice to terminate tenancy with effect from 31st March, 2002 but it did not hand over the premises until on 25th November, 2002 in the presence of PW3 and after repairs to the property.

The court heard that PW3 was not a party to the lease agreement because the suit premises were registered in the name of his wife, the 1st respondent. He opened the water account in his name; the water meters were installed but PW3 could not tell when. Water bills started coming to him. The appellant could only open its water account after the 2nd respondent had closed his; that never happened. It did not pay the water bills, a thing PW3 thought the appellant, a big company, could do without prompting. And if the appellant considered the bills rather too high, it could go and complain. On opening of the water account, any arrears had to be cleared. The 37 tenants then used that meter. City Council did not at any time complain of illegal water connection to the suit premises and meters are the property of the local authority. The court also heard that the 2nd respondent could not close his water account with unpaid water bills pending. And the appellant

"…did not deny responsibility for payment of water bills."

Its staff remained in the premises until November, 2002 when vacant possession was given. All the time from 31st March, 2002 the respondent did not move to take possession because by her letter of 20th February, 2002, the 1st respondent had told the appellant that it could not terminate the tenancy without giving the agreed 3 months notice. So they gave the appellant time to move out, even as it was a bad tenant that delayed in remitting rents. The respondents did not cause delay in handing back the premises. PW3 did not give notice to sue but he was not a stranger to the suit. The letter of 17th July, 2002, included claim for water bills only issued when meters were installed. The statutory notice the 1st respondent issued was included in the bundle of exhibits produced by consent and so it was not necessary to produce that notice separately. The respondent's case came to a close and the appellant presented one ***Zachary Ochako*** (DW1), its Administrative manager.

DW1 was conversant with the facts of the case: the suit premises, the lease agreement and handing over of the premises. The witness produced a bundle of documents as exhibits. He added that there was no confirmation that 37 water meters were installed or that the water account was opened in the name of the 2nd respondent. There was initially an understanding to pay Sh.300/= flat rate per year and:

"No bills were sent to KBC for settlement – not to my knowledge."

When the lease was due to expire on 31st March, 2002 the appellant accordingly informed the 1st respondent/landlady that it did not wish to review it. Even as the response of 20th February, 2002 raised issues of pending water and electricity bills, repairs, rent arrears and 3 months notice, DW1 was surprised because the appellant had been up-to-date in rent payments and no water accounts were opened for the respective flats. If such accounts had been opened Clause 4 of the lease agreement which read:

"4. The lessee shall open and maintain water and electricity accounts in its name and expense…",

could not have posed a problem. When DW1 contacted the 2nd respondent with a view to hand over the premises, he answered that that would be addressed by the 1st respondent; they never got back to him until 25thNovember, 2002 when the premises were handed back. There was no complaint about the time lapse in between. Water was never disconnected for non-payment of bills:

"It was still one connection."

DW1's position was that, there was no basis to claim Sh.6,423,429/60 in rent since the lease had been terminated. The witness could not see how the 2nd respondent, not a party to the lease agreement, came into the case. He was claiming Sh.3.0 million from the appellant for water consumed yet he did not serve the requisite notice as per the appellant's statute. The water bills were exaggerated because:

(i) There was only one meter."

There were no 37 meters which the appellant was being asked to pay for. After all, water meters belonged to City Council.

The trial judge heard in cross-examination that as per the lease agreement of 24th March, 1997:

"We were not responsible for opening and maintaining water accounts… the lease agreement notwithstanding, the meters were not installed by the corporation."

Then as if to reverse the earlier assertion DW1 said:

"Under the lease KBC was supposed to open and maintain water accounts."

Then further on DW1 told the trial court:

"The landlady did not install the meters … It was responsibility of Landlady to provide water. We were supposed to open our accounts. But there was only one meter and water was connected to the premises --- the landlord was supposed to connect water meters, after corporation would take over."

DW1 then went on to answer that it was the appellant's responsibility to pay for the water once its staff took possession. No bills were forwarded to the appellant for settlement, but the water account receipts were sent to the appellant for refund. As per the lease, the appellant would take over the water accounts and make refund for expenses incurred by the landlord in whose name the water account was. The account/accounts were never transferred into the name of the appellant. Shown the letter of 13th September, 1999 forwarding water bills to the appellant, DW1 had to change his position and admit:

"I therefore agree that the landlord had been forwarding bills."

And then:

"KCB does not deny responsibility for settling water bills."

And after admitting that with the water accounts in the name of ***David Kibiro Gathoga***, the 2nd respondent, to whom the water bills were sent, DW1 said:

"In view of the explanation, I agree that KBC knew that they were consuming water in the name of *David Kabiro****. If the bills were received and were in order, then KBC obviously had obligation to pay and settle bills in the name*** *David Gathoga****."***

On handing back the premises, DW1 told the court that he contacted the respondents, not in writing, for the same. But after the repairs were completed the respondents' agent invited the appellant for the handing over. Rents were paid quarterly and no arrears were owing at the time the lease expired. The witness repeated that the appellant had the responsibility to settle the water bills forwarded to it and such bills could not issue without water accounts being opened. So when bills began arriving and were forwarded to the appellant, no account or accounts had been opened and water meters fitted. The appellant did not pay for water at the flat rate of Sh.300/=.

There was a brief re-examination of the witness before ***Stanley Kipsang Kamoing*** (DW2) the appellants' accountant, mounted the witness box.

DW2 went over the quarterly payments the appellant made in respect of the leased suit property, concluding that no rents were owing as at the expiry of the lease. That closed the trial and parties filed written submissions. The judge then penned and delivered the subject judgment herein.

From the evidence we have reviewed, we think only two issues stood to be determined by the trial court: whether any rents were owed after the expiry of the lease and whether the appellant was liable to pay for the water consumed during the tenancy.

It is not in dispute that the parties entered in a tenancy agreement in respect of the suit property beginning with the one dated 24th March, 1997. There followed renewals with the last one expiring on 31st March, 2002. It is not also in dispute that as at that date, the rent payable per month was Sh.458,861/40. Both sides are agreed on this and their testimonies speak of that.

It is also not in dispute that the appellant issued a notice dated 12th February, 2002 wishing not to renew the tenancy. It was addressed to the 1st respondent. There does not appear to have been major difficulties in the termination of tenancy even as the 1st respondent seemed to indicate in her reply of 20th February, 2002 that the 3 month notice had not been complied with. On the evidence before us, we find that the date of termination was 31st March, 2002 when the last agreement expired. The evidence also has it that vacant possession of the premises was not given to the respondents until 25th November, 2002 as evidenced by the handing over/taking over report – signed by both sides and duly witnessed.

Beginning with the rent ordered by the trial court to be paid, we too on our part have found that it was the appellant who delayed handing back the premises to the 1st respondent landlady. ***Ochako*** (DW1) told the trial judge that the appellant did not hand over the premises on 31st March, 2002 and he did not know when the last tenant left. Repairs were carried out on the premises and the handing over/taking over report was signed also by the contractor who did the repairs. Accordingly, even if the respondents had prayed to be paid *mesne* profits in terms of section 14 of the ***Distress for Rents Act (Cap 293)***, the trial court was right not to grant the prayer accordingly because the appellant remained in occupation past the notice date yet the landlady took no steps to recover the premises.

The said section 14 states in the relevant parts that:

"14. If a tenant gives notice to his landlord of his intention to quit the premises held by him at a time mentioned in the notice, and does not accordingly deliver up the possession thereof at the time specified in the notice, then the tenant … shall from thenceforth pay to the landlord double the rent or sum which he should otherwise have paid … and the double rent or sum shall continue to be paid while the tenant continues in possession, and the double rent may be destrained for in the same

manner as provided for…"

In the circumstances and having found that the appellant did give notice to vacate but did not leave on the date stated – 31st March, 2002 and the landlady took no steps to recover the premises, she acquiesced in the continued occupation. According to the 2nd respondent they gave time to the appellant to vacate. Therefore we find as the learned judge also correctly found, that the appellant became a month-to-month tenant after 31st march, 2002 and was therefore obliged to pay the monthly rent of Sh.458,816/40. The appellant remained in possession for 8 months before handing over. It was fair and proper that despite the pleadings, evidence proved holding over the premises by the appellant. Thus section 14 of the Act could not and did not apply and in invoking the powers donated by ***sections 106, 116 of the Transfer of Property Act***, it was just and fair that the appellant do pay the total rents duly computed. To find otherwise as the appellant appeared to ask us to do, would mean that in the light of the relief proved by evidence, the respondents be denied justice. The landlady was entitled to the relief that the High Court, granted with which we agree entirely. We dismiss the ground.

The issue of water bills is to us clear. The 2nd respondent opened the water account with the City Council, and a meter was installed through which water flowed to be consumed by the 37 tenants in the premises.

Clause 4 of the tenancy agreement clearly stated that the opening and maintaining of the water accounts was the responsibility of the appellant. It has not been shown that it did that and from the evidence of ***Ochako*** (DW1), he is clear on this. The tenants consumed water using the account opened by the 2nd respondent. It is no matter that all 37 meters were not installed. Even that fell on the appellant. The meters could only be installed after it had opened water accounts with the City Council. It did not. Bills were sent to the premises; they were in the name of the 2nd respondent who had opened an account with City Hall. Evidence has it that those bills were forwarded to the appellant and hand-delivered. And DW1 agreed that in the circumstances, the appellant ought to have made payments. The bills were never returned neither were they paid. The learned judge scrutinized the many bills exhibited, a thing we have also done. We similarly agree with the trial judge that when the appellant breached clause 4 of the tenancy agreement by failing to open water accounts, yet its staff (the tenants) continued to consume the water using the facilities installed by the 2nd respondent, there was an implied undertaking on the part of the appellant that it would pay for that water. On scrutinizing the bills for the various flats, and with no certain evidence as to when all the 37 meters were installed, the times of the readings, and the exact amounts billed, the best we could make of the whole thing is to confirm that the total amount the appellant should pay is as found by the learned judge – Sh.2,729,921/15 in accordance with the direction given as to the mode of payment. Accordingly we dismiss this ground.

If we may turn to the other grounds raised in the appeal, there is this ***section 46(a) of the Kenya Broadcasting Corporation Act*** which reads that:

"46. Where any action or other legal proceedings is commenced against the corporation or execution, or intended execution of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or any such duty or authority, the following provisions shall have effect –

a. ***the action or legal proceedings shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim and of the mention to commence the action or legal proceedings, has been served upon the Managing Director by the plaintiff or his agent;***

b. **…"**

The acts the appellant performs to which section 46 applies are set out in section 8. They are eleven of them ranging from providing broadcasting services locally and externally, operating plant and equipment, hiring artistes, providing facilities for advertising and so on and so forth. None of the functions the appellant does in pursuant of its Act, includes its undertakings as a tenant or other. So when the appellant

rented accommodation for its staff, as the case is here, that did not fall within section 46. In any case, we were satisfied that on 17th July, 2002 the 1st respondent served a notice on the appellant's managing director well before filing the suit on 18th October, 2002. It does not appear to have been a necessary step but it was taken. And in the filed suit, there was a claim for outstanding water bill as at 31st May, 2002. It does not matter that the 2nd appellant featured in this case particularly on account of the water account he opened in respect of the suit premises registered in the name of the 1st respondent, his wife. This issue of notice was not even among the grounds filed by the parties on 11th September, 2003 for determination. In the circumstances, we do not think that even if the 2nd respondent was not a party to the subject lease agreement, he ought to have issued a separate notice under section 46 (above). Probably technically so, but in essence, we do not see much substance in that ground raised in the memorandum. We dismiss this ground.

Equally to be dismissed are points taken up in the appellants' submissions, not in the memorandum of appeal, that the respondents filed a notice of appeal on 28th October, 2004, which was not followed with filing a record of appeal. That the notice was not withdrawn; it remains on record.

Further, that the respondents did not file notice to affirm the High Court decision in terms of Rule 94 of the Court of Appeal rules. The said rule reads in its pertinent part, that:

"94. (1) A respondent who desires to contend on an appeal that the decision of the superior [High] Court should be affirmed on grounds other than additional to those relied upon by that court shall give notice to that effect, specifically the grounds of his contention.

(2) … (5) …"

We did not clearly discern from the appellants' submissions what these points were all about. If the respondents filed a notice of appeal against the High Court decision and left it at that, it has fallen by the wayside or is deemed withdrawn and has no effect one way or the other in this appeal. As for the notice to affirm, it should be filed by a respondent who contends that the High Court decision should be affirmed on grounds other than those that it relied on. That was not the case with the respondents in this appeal. It did not appear to us that they had other grounds upon which they desired this appeal to be affirmed. Therefore we find no merit in these grounds and we dismiss them.

All in all, we come to the conclusion that this appeal be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 31ST day of July, 2015.

J. W. MWERA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR